## Aboys ak Saon (M) v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO Q-05–393 OF 2010
ABU SAMAH, SYED AHMAD HELMY AND AZIAH ALI JJCA
30 AUGUST 2012

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*Criminal Law — Murder — Defence — Private defence — Burden of proof — Standard of proof — Whether proven*

C

*Criminal Law — Penal Code — s 302 — Murder — Appeal against conviction and sentence — Whether murder weapon positively identified — Whether DNA profiling of blood stains on murder weapon matching deceased DNA — Defence of private defence and sudden fight rejected*

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The appellant was charged and convicted of the offence of murder under s 302 of the Penal Code. There were three eyewitnesses to the incident, namely PW2, PW5 and PW6. PW2 and PW6 testified that there was a quarrel between the appellant and the deceased and that they saw the appellant hit the deceased's head three times with the blunt part of a hoe ('cangkul') ('exh P5'). The pathologist testified that the deceased suffered fatal head injuries caused by a blunt force. The chemist ('PW8') confirmed that the DNA analysis on the blood stains found on the hoe belonged to the deceased. The appellant claimed that he acted in self-defence and had no intention of killing the deceased. According to the appellant, the deceased had tried to hit him with a 'cangkul' and during a struggle, the appellant had pushed the 'cangkul' and it hit the deceased's forehead. The trial judge ('judge') dismissed the defence of accident and self-defence as a pure concoction and convicted the accused and sentenced him to death. The appellant appealed against conviction and sentence on two grounds: (i) firstly, that there was a doubt as to the identity of the weapon used. PW2 identified the weapon ie the hoe as exh P5 but PW6 had testified that the hoe was smaller than P5; and (ii) secondly, that the appellant had acted in self-defence.

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**Held**, dismissing the appeal:

(1) The first ground of appeal was without any merit as PW2 had positively identified exh P5 as the weapon which the appellant used to hit the deceased's head. Her evidence was corroborated by PW8 who stated in his report that the DNA profiling of the blood stains found on exh P5 matched with the DNA profiling of the blood specimen taken from the deceased (see para 14).

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(2) The burden of establishing private defence is on the appellant. The standard of proof is on a preponderance of probabilities (see para 17); *Chung Tain Kong @ Chung Fook Chung v Public Prosecutor* [2009] 5 MLJ 1 referred.

(3) There was no evidence that the appellant had acted in exercise of his right to private defence or that there was a sudden fight due to provocation by the deceased (see para 19).

**[Bahasa Malaysia summary**

Perayu dituduh dan disabitkan terhadap kesalahan membunuh di bawah s 302 Kanun Keseksaan. Terdapat tiga saksi kepada kejadian tersebut, iaitu PW2, PW5 dan PW6. PW2 dan PW6 memberi keterangan bahawa terdapat pergaduhan di antara perayu dan si mati dan mereka melihat perayu memukul kepala si mati tiga kali dengan bahagian tumpul cangkul ('lampiran P5'). Patologi memberi keterangan bahawa si mati mengalami kecederaan kepala yang membawa maut disebabkan pukulan tumpul. Ahli kimia ('PW8') mengesahkan bahawa analisis DNA ke atas kesan darah yang dijumpai di atas cankul kepunyaan si mati. Perayu mendakwa bahawa dia bertindak dalam mempertahankan diri dan tidak berniat membunuh si mati. Mengikut perayu, si mati telah mencuba memukul dia dengan cangkul dan semasa pergelutan, perayu telah menolak cangkul dan memukul dahi si mati. Hakim bicara ('hakim') menolak pembelaan kemalangan dan mempertahankan diri sebagai rekaan semata-mata dan mensabitkan tertuduh dan menghukumnya dengan hukuman mati. Perayu merayu terhadap sabitan dan hukuman atas dua alasan: (i) pertama, terdapat kesangsian terhadap identiti senjata yang digunakan. PW2 mengenal pasti senjata iaitu cangkul sebagai lampiran P5 tetapi PW6 telah memberi keterangan bahawa cangkul adalah lebih kecil daripada P5; dan (ii) kedua, bahawa perayu telah bertindak dalam mempertahankan diri.

**Diputuskan**, menolak rayuan:

(1) Alasan pertama rayuan adalah tanpa apa-apa merit memandangkan PW2 telah secara positif mengenal pasti lampiran P5 sebagai senjata yang digunakan oleh perayu untuk memukul kepala si mati. Keterangannya disokong oleh PW8 yang menyatakan di dalam laporannya bahawa profil DNA kesan darah yang didapati atas lampiran P5 sama dengan profil DNA spesimen darah yang diambil daripada si mati (lihat perenggan 14).

(2) Beban untuk membuktikan pertahanan persendirian adalah atas perayu. Standard bukti adalah atas jumlah besar kebarangkalian (lihat perenggan 17); *Chung Tain Kong @ Chung Fook Chung v Public Prosecutor* [2009] 5 MLJ 1 dirujuk.

(3) Tidak terdapat keterangan bahawa perayu telah bertindak dalam

menjalankan haknya kepada pertahanan persendirian atau terdapat pergaduhan tiba-tiba akibat provokasi oleh si mati (lihat perenggan 19).]

**Notes**

For cases on defence, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1480–1508.

For cases on s 302 of Penal Code, see 4(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1815–1931.

**Cases referred to**

*Chung Tain Kong @ Chung Fook Chung v PP* [2009] 5 MLJ 1, CA (refd)

*Wong Teck Choy v PP* [2005] 4 MLJ 693; [2005] 3 CLJ 431, CA (refd)

**Legislation referred to**

Penal Code ss 96, 97, 98, 99, 100, 100(a), (b), (c), (d), (e), (f), 101, 102, 103, 104, 105, 106, 302

**Appeal from**: Criminal Trial No 45–3 of 2009 III (High Court, Kuching)

*Wit ak Malang (Wit & Co) for the appellant.*

*Awang Armadajaya bin Awang Mahmod (PG Cyrill a/l PG Chandradasa with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

**Abu Samah JCA (delivering judgment of the court):**

**[1]** The appellant, aged 25, was charged and convicted of the offence of murder under s 302 of the Penal Code by the Kuching High Court for causing the death of Mupug ak Sat ('deceased'), aged 42, on 14 October 2007 at about 5.30pm at a garden in Kampung Tebia Maras, Padawan, in the District of Kuching, Sarawak. The garden referred to in the charge was in fact an area outside the house of PW5, who was the appellant's elder sister.

**[2]** The appellant and the deceased were no strangers to each other. The deceased was the appellant's cousin. The witnesses at the scene of the incident were also known to the appellant and the deceased. There were three eyewitnesses to the incident, namely PW2, PW5 and PW6. PW2 was the deceased's former wife. They were divorced three years before the incident. PW5 was the appellant's elder sister. She however turned hostile and gave evidence materially different from the statement she gave to the police on what she knew about the incident. Her evidence was successfully impeached by the prosecution. PW6 was the appellant's uncle.

**[3]** PW2, aged 41, had known the appellant for about six months prior to the

A incident. They became friends. There was an allegation by the defence that she had an affair with the appellant which she denied.

**[4]** On the day of the incident, ie 14 October 2007 the appellant, the deceased, PW2 (the deceased's former wife) and PW6 were at the house of the B appellant's sister (PW5). PW5 was married to Dom but he was not an eyewitness to the incident. They had a son, by the name of Tiha. There were others at the house but they also did not witness the incident.

**[5]** PW2 told the court that on 14 October 2007 she went to PW5's house. C There was a quarrel between the appellant and the deceased at the house. She did not know why they quarrelled. After that she saw the appellant hit the deceased's head three times with the blunt part of a hoe (cangkul). This happened outside the house. She saw the appellant took the *cangkul* (exh P5) from the wall of the house. After the appellant hit the deceased on his head the D deceased collapsed and his head was bleeding.

**[6]** PW6 testified that on 14 October 2007 he was at his cousin's house, named Tiha. Tiha is PW2's son. Based on the evidence of PW2 and PW6 Tina's E house was in fact PW5's house. According to PW6, the appellant, the deceased and his ex-wife (PW2) were also at the said house. He saw the appellant and the deceased were having a conversation outside the house. In cross-examination, PW6 said that he heard them quarrelling outside the house. After that he saw the appellant hit the deceased's head three times with the blunt part of a F cangkul and as a result the deceased fell to the ground. In examination-in-chief PW6 was asked whether exh 1D5 was the cangkul used by the appellant but he said that the cangkul which the appellant used to hit the deceased's head was smaller than 1D5. He said that the handle was shorter.

G **[7]** PW8, the scientific officer attached for the Chemistry Department, Kuching, Sarawak, gave evidence that he carried out the DNA profiling of the blood stains found on the hoe (exh P5). The result of his finding can be found in his report (exh P11). The report states that the partial DNA profile developed from the stains on the hoe matched with the DNA profile developed H from the blood specimen taken from the deceased.

**[8]** PW9, the pathologist who conducted the post mortem on the deceased gave evidence that the deceased suffered head injuries caused by a blunt force. The injury to the head was fatal in nature. In examination-in-chief, she I described the injuries as follows:

> In my opinion based on post mortem examination, the deceased suffered a blunt force trauma to the left side of the head which caused the skull on the left side to fracture. The fracture also extended to the base of the skull and the left side. The blunt force trauma caused a L shaped fracture also on the left side of skull. This blunt

force trauma caused the subdural haemorrhage which is bleeding under the brain covering with associated bruise of the left hemisphere. Bleeding could also be seen in the brain stem. These injuries to the brain especially to brain stem, could cause immediate death to the deceased …

In my opinion the head injury is sufficient to cause death.

**[9]** The learned trial judge held that both PW2 and PW6 had given credible evidence. PW6 corroborated PW2's evidence. The chemist (PW8) confirmed that the DNA analysis on the blood stains found on the hoe belonged to the deceased. The pathologist (PW9) said that the injuries suffered by the deceased were sufficient to cause death in the ordinary cause of nature. None of the prosecution witnesses gave evidence that the appellant acted in self-defence. Nor was there any evidence of a sudden fight. Hence, he found that the prosecution had established a prime facie case against the appellant and ordered him to enter his defence.

**[10]** The appellant gave evidence on oath. His defence was that he acted in self-defence and had no intention of killing the deceased. The appellant told the court that in the morning on 14 October 2007 he went to church with PW2. In the afternoon, he went with PW2 to his sister's house who invited him for lunch. The deceased came to the house later. At first, nothing happened. But late in the evening the deceased sat beside him and said some harsh words to him and slapped him.

**[11]** About half an hour later, he went out of the house to urinate. He heard footstep's coming from the back. When he turned back he saw the deceased trying to hit him with a *cangkul*. He managed to avoid it. There was a strangle. In the course of it, he pushed the *cangkul* and hit the deceased's forehead. After the struggle the deceased went back to the house and collapsed outside the house. In a nutshell this was what the appellant said in his defence:

BEFORE THE INCIDENT

Q: Can you tell the court after Mupug came, what happened?

A: At first nothing happened, but late in the evening, roughly around 6pm, Mupug sat beside me and said harsh words, 'kurang ajar', then he slapped me on the face and pushed me but I tried to avoid by sitting far away from him.

DURING THE INCIDENT:

Q: Did Mupug manage to hit you?

A: I managed to avoid the swing of the cangkul.

Q: What happened after that?

A: The second time Mupug tried to swing the cangkul, the same time he

pushed me down, but I managed to avoid and put up a struggle. I held the cangkul and the same time the cangkul hit the forehead of Mupug but we still put up a struggle. I then pushed him with the cangkul which hit his head. Then we stopped and Mupug went back to the house where he collapsed outside the house.

**[12]** At the end of the defence case, the learned trial judge found that the defence of accident and self-defence was a pure concoction. The appellant's story that the deceased slapped and said harsh words to him was an afterthought. He held that the prosecution had proved its case beyond reasonable doubt and accordingly convicted him for the murder of the deceased and sentenced him to death. The appellant appealed to this court, which we dismissed at the end of the hearing of the appeal.

## THE APPELLANT'S APPEAL

**[13]** The appellant raised two grounds of appeal. The first was that there was a doubt as to the identity of the weapon used. PW2 identified the weapon ie the hoe as exh P5 (originally marked as ID5) but PW6, during his examination-in-chief said that the hoe was smaller than P5:

> See this cangkul, ID5, compare with this, the cangkul used to hit Mupug, bigger or smaller than this?
>
> A: Smaller than ID5.
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> Q: How small? Which part?
>
> A: Handle shorter.
>
> Q: How about the metal part?
>
> A: Same.

**[14]** In our view this ground of appeal was without any merit as PW2 had positively identified exh P5 as the weapon which the appellant used to hit the deceased's head. Her evidence was corroborated by PW8 who stated in his report that the DNA profiling of the blood stains found on exh P5 matched with the DNA profiling of the blood specimen taken from the deceased.

**[15]** The other ground of appeal was that the appellant had acted in self-defence. The issue whether the appellant acted in self-defence or whether there was a sudden fight due to provocation had been considered by the learned trial judge before making a ruling that the prosecution had established a prime facie case against the appellant. His Lordship held that there was no such evidence. At p 11 of his judgment (p 121 of the appeal record) the learned trial judge said:

None of the witnesses told the court that the accused acted in self-defense. Counsel for accused put to the investigating officer that the accused told him that he acted in self-defense but this was denied. Counsel did not put to PW2 and PW6 that the accused acted in self-defense in causing the injuries to the deceased. There is no evidence of sudden fight between the accused and deceased. PW2 and PW6 only said they quarreled. They never said that the quarrel let to a fight. There is also no evidence that the deceased had given the accused any grave and sudden provocation that led him to lose the power of self-control.

**[16]** At the end of the trial, the learned trial judge had carefully scrutinised the appellant's defence, in particular whether he acted in self-defence or by accident, unintentionally caused the injuries suffered by the deceased.

**[17]** The learned judge had also dealt with the law on the right to private defence under ss 96–106 of the Penal Code. He was fully conscious that s 96 of the Penal Code provides that nothing is an offence which is done in the exercise of private defence. Section 97 provides that the right of private defence extends to protection of a person's own body. But such right is subject to limitations in s 99, one of which is that the right of private defence does not extend to the inflicting of more harm than it is necessary to inflict for the purpose of defence (see *Wong Teck Choy v Public Prosecutor* [2005] 4 MLJ 693; [2005] 3 CLJ 431. Section 100 stipulates that the right of private defence of the body extends, under the limitations in s 99, to voluntary causing of death or of any harm to the assailant if the offence which occasions the exercise of the right fall within any of the descriptions in (a) to (f) of that section. The burden of establishing private defence is on the appellant. The standard of proof is on a preponderance of probabilities. (*Chung Tain Kong @ Chung Fook Chung v Public Prosecutor* [2009] 5 MLJ 1.

**[18]** After considering the facts before him and the law on private defence the learned trial judge held that 'the defence of accident and self-defence is a pure concoction on the part of the accused'. For convenience, this is what the learned trial judge said in his judgment (pp 125, 126 and 128, record of appeal):

The first question that should be addressed is whether the accused had been attacked by the deceased. However my finding is that the prosecution has proved beyond reasonable doubt that the accused was the assailant all along and that the deceased was the defenseless victim …

Despite minor inconsistencies that I have addressed earlier, they gave consistent evidence on this points throughout their long testimony. For reasons given earlier I found them to be credible witness. Now the accused would have the court to believe that nothing happened at the verandah but that incident that resulted in the death of the deceased occurred, behind the house which is conveniently out of sight of the witnesses. The case for the defence is nothing happened at the verandah. The only

A thing that happened there was that the deceased who was already injured climbed onto the said verandah and collapsed to the floor. However this version of the events was never put to PW2 and PW6 during the case for the prosecution …

I also disbelieve the version given by the accused for the following reasons … In my opinion, having regard to the above circumstances, the defence of accident and
B private defence is a pure concoction on the part of the accused.

The learned trial judge gave his reasons for disbelieving the appellant in his grounds of judgment, which we do not think it necessary to repeat them here.

C **[19]** We have however examined the reasons given by the learned trial judge and verified the findings of fact by him with the totality of evidence before him. We agreed that there was no evidence that the appellant had acted in exercise of his right to private defence or that there was a sudden fight due to provocation by the deceased. The appellant did not raise the defence of grave and sudden
D provocation in the court below and before us but the learned trial judge, as a matter of prudence, did nevertheless considered it. In our judgment, the learned trial judge did not err in facts and in law in arriving at his decision.

**[20]** For the reasons as aforesaid we dismissed the appeal by the appellant
E against his conviction and sentence under s 302 of the Penal Code.

*Appeal dismissed.*

F Reported by Kanesh Sundrum

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